

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 13, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2306

Cir. Ct. No. 2013TP000223

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO JASMINE P., A PERSON
UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

KIWANA L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MARK A. SANDERS, Judge. *Affirmed.*

¶1 BRENNAN, J.¹ Kiwana L. appeals from an order terminating her parental rights to Jasmine P. She complains that the circuit court violated her substantive due process rights when it found grounds for termination because she believes that the conditions of return were not narrowly tailored to address her mental health issues. For the reasons which follow, we disagree and affirm.

BACKGROUND

¶2 Kiwana is the biological mother of Jasmine, who was born on August 31, 2010. At the time of Jasmine’s birth, Kiwana had three other children

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Pursuant to WIS. STAT. RULE 809.107(6)(e), this court is required to issue a decision involving termination of parental rights (“TPR”) appeals within thirty days after the filing of the reply brief. We may extend that deadline pursuant to WIS. STAT. RULE 809.82(2)(a) for good cause. See *Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). Good cause is found and this court now extends the decisional deadline in these matters through the date of this decision.

We also note that Jasmine’s guardian ad litem neither filed a brief with this court stating her position on the matters raised by Kiwana on appeal nor did she file a letter signing on to the State’s brief. Our supreme court has stated:

“The guardian ad litem serves a twofold purpose. He [or she] acts as an advocate and legal representative to protect and advance the best interests of the children. In such capacity, he [or she] possesses all the rights, powers and obligations normally accorded to a legal advocate in a trial setting.”

These rights, powers and obligations do not terminate at the trial level but continue on appeal. Their proper performance requires the guardian ad litem to communicate his [or her] position to this court. Such communication may be made by letter, filing of a brief or by personal appearance if deemed necessary.

Marotz v. Marotz, 80 Wis. 2d 477, 488, 259 N.W.2d 524 (1977) (citation omitted). The guardian ad litem did not fulfill those duties in this case. However, because the issues raised by Kiwana appear to have been fully briefed by Kiwana and the State, we decide those issues despite the guardian ad litem’s oversight.

and was on probation for child endangerment in Illinois. As part of her probation, Kiwana was required to cooperate with the child welfare authorities in Milwaukee.

¶3 In October 2010, the Bureau of Milwaukee Child Welfare (“the BMCW”) conducted an initial assessment of Kiwana’s home. Kiwana was a single mother, with a brand new baby and three other children. She had little support and appeared to be overwhelmed with all of her responsibilities. In addition, Kiwana had untreated bipolar disorder with manic tendencies and depression. The BMCW was concerned for the children because of the issues revealed by the initial assessment.

¶4 Shortly after the initial assessment, the BMCW attempted to set Kiwana up with a safety services program to assist her with the challenges she was facing. However, Kiwana decided not to cooperate and determined that she did not need the safety services program. After a few more concerning instances—including reports that the older children were engaging in unsafe and aggressive behavior, that Kiwana was unable to properly discipline the children, and that Kiwana’s serious mental health issues remained untreated—the BMCW made the decision to detain all of Kiwana’s children. Jasmine was detained on January 25, 2011.²

¶5 Following Jasmine’s detainment, the BMCW placed Jasmine in a foster home and created a visitation schedule for Kiwana and Jasmine. Kiwana was supposed to visit Jasmine twice a week. Kiwana attended those visits for approximately three months before she stopped visiting Jasmine in May 2011.

² Jasmine’s siblings were also detained. However, only the order terminating Kiwana’s parental rights to Jasmine is before the court.

¶6 On July 26, 2011, the circuit court found Jasmine to be in need of protection and services (“CHIPS”) and entered an order setting forth conditions for her return to Kiwana’s custody.³ On August 15, 2011, the circuit court entered a dispositional order placing Jasmine outside of Kiwana’s home.

¶7 In December 2011, Kiwana moved to Tennessee to be closer to her son, who had recently moved there with his father. Kiwana did not visit Jasmine again until January 2012, after not seeing her or otherwise contacting her since April 2011. However, even after January 2012, Kiwana’s visits with Jasmine were sporadic, and Kiwana failed to otherwise contact Jasmine through letters or phone calls. Kiwana did not see Jasmine at all for six of the twelve months of 2012.

¶8 In January 2013, Kiwana resumed sporadic visits with Jasmine. However, in June 2013, Kiwana told her case manager that she wanted to suspend visitation for six months. During the time Kiwana voluntarily stopped visiting Jasmine, the BMCW encouraged Kiwana to have other forms of contact with Jasmine, such as letters, phone calls, or whatever contact method she preferred. However, Kiwana chose not to write, call, or to otherwise contact Jasmine in any way.

¶9 On July 30, 2013, the State filed a petition to terminate Kiwana’s parental rights (“TPR”) to Jasmine, alleging two grounds for termination under WIS. STAT. § 48.415: (1) continuing-CHIPS, pursuant to § 48.415(2); and (2) failure-to-assume-parental-responsibility, pursuant to § 48.415(6).

³ The Honorable M. Joseph Donald presided over the CHIPS proceedings and entered the CHIPS order setting forth the conditions required for Jasmine’s return to Kiwana’s care.

¶10 At Kiwana's initial appearance on August 23, 2013, Kiwana appeared without counsel and was advised of her rights. The case was adjourned to allow Kiwana to obtain counsel. At the same hearing, the State requested that visitation be formally suspended. The court determined that visits would remain suspended until a hearing could be held on the issue.

¶11 On November 14, 2013, an evidentiary hearing was held on the issue of visitation. Elizabeth Lanter, Jasmine's therapist, testified that Kiwana's sporadic visits greatly exacerbated Jasmine's already extreme anxiety issues. The therapist explained that Jasmine had trouble with transitions and meeting new people. The therapist wanted to keep visitation suspended until Kiwana demonstrated that she could be consistent with her visits.

¶12 Subsequently, the circuit court decided to create a roadmap to re-introduce Kiwana into Jasmine's life. The court wanted the therapist to begin by introducing the idea of Kiwana's existence to Jasmine, then having Kiwana write a letter to Jasmine and to slowly introduce visits. The court held that it would not establish a firm timetable and would rely on the therapist to guide the process, but told Kiwana to file a motion if the parties were "not doing what they were supposed to do." Almost two months later, Kiwana wrote Jasmine one letter. However, Jasmine's therapist never gave the letter to Jasmine because Jasmine continued to react poorly to any mention of Kiwana.

¶13 The case was tried to the circuit court on July 7 and July 8, 2014. At the conclusion of the trial, the court found that there were grounds to terminate Kiwana's parental rights to Jasmine under WIS. STAT. § 48.415: (1) continuing-CHIPS, pursuant to § 48.415(2); and (2) failure-to-assume-parental-responsibility, pursuant to § 48.415(6). The court noted the efforts that the BMCW engaged in to

help Kiwana, “includ[ing]: “Ongoing provisions for visitation; ongoing therapeutic efforts for Jasmine; case management services, that are testified to by each of the former case managers; informal counseling of [Kiwana], that is, encouraging her to engage in mental health treatment, encouraging her to remain in the state of Wisconsin so that she can more closely develop a relationship with Jasmine.” The circuit court also noted that Kiwana’s choice to move to Tennessee made it more difficult for the BMCW to provide Kiwana with the services she needed. The court then made the requisite unfitness findings.

¶14 Immediately following the circuit court’s decision finding grounds to terminate Kiwana’s parental rights, the court proceeded to the dispositional hearing. The court found it was in Jasmine’s best interest to terminate Kiwana’s parental rights to Jasmine. Kiwana now appeals.⁴

DISCUSSION

¶15 Kiwana contends that the circuit court violated her substantive due process rights when it found grounds to terminate her parental rights pursuant to WIS. STAT. § 48.415(2).⁵ Whether an individual’s substantive due process rights have been violated by governmental action presents a question of law subject to independent appellate review. *Monroe Cnty. DHS v. Kelli B.*, 2004 WI 48, ¶16,

⁴ The order terminating Kiwana’s parental rights to Jasmine also terminates the parental rights of Jasmine’s biological father. Only Kiwana’s parental rights are before us on appeal.

⁵ Kiwana makes a similar argument with regards to the circuit court’s finding that she was unfit pursuant to WIS. STAT. § 48.415(6), that is, for failure to assume parental responsibility. We need not address the particulars of her argument, however, because we conclude that the circuit court did not err when it found Kiwana unfit pursuant to § 48.415(2), and § 48.415 only requires one ground to find a parent unfit. *See Steven V. v. Kelley H.*, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856; *see also State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (we decide cases on the narrowest possible grounds).

271 Wis. 2d 51, 678 N.W.2d 831. To the extent that this appeal requires us to interpret the statute, we will avoid any interpretation that creates a constitutional infirmity. See *Kenosha Cnty. DHS v. Jodie W.*, 2006 WI 93, ¶20, 293 Wis. 2d 530, 716 N.W.2d 845.

¶16 Substantive due process rights flow from the Fourteenth Amendment of the United States Constitution and from article I, sections 1 and 8, of the Wisconsin Constitution. *Jodie W.*, 293 Wis. 2d 530, ¶39. This form of due process protects individuals from government actions that are arbitrary or wrong without regard to the fairness of the procedures used to implement them. *Kelli B.*, 271 Wis. 2d 51, ¶19. Substantive due process demands that a statute interfering with a fundamental liberty interest be narrowly tailored to advance a compelling state interest justifying the interference. *Jodie W.*, 293 Wis. 2d 530, ¶39.

¶17 A parent’s fundamental right to care for and maintain custody of his or her own child is well-recognized. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ann M.M. v. Rob S.*, 176 Wis. 2d 673, 686, 500 N.W.2d 649 (1993). A parent establishes this fundamental liberty interest by living with the child and holding custody of the child. *Kelli B.*, 271 Wis. 2d 51, ¶24. The State does not dispute that Kiwana has established a fundamental interest in parenting Jasmine.

¶18 The State has a compelling interest in protecting children from unfit parents. See *Jodie W.*, 293 Wis. 2d 530, ¶41. There is also a temporal component to the State’s interest “that promotes children’s welfare through stability and permanency in their lives.” *Dane Cnty. DHS v. P.P.*, 2005 WI 32, ¶32, 279 Wis. 2d 169, 694 N.W.2d 344.

¶19 Kiwana complains that the circuit court’s finding of parental unfitness pursuant to WIS. STAT. § 48.415(2) violated her constitutional right to

substantive due process because the court-ordered conditions for return were not narrowly tailored to account for Kiwana's substantial mental health issues and resulting financial difficulties. As such, she argues that the conditions of return—including, maintaining a relationship with Jasmine and demonstrating an ability and willingness to care for Jasmine full time—were impossible for her to meet. We disagree and affirm.

¶20 To establish the continuing-CHIPS ground for termination of parental rights, pursuant to WIS. STAT. § 48.415(2), the State must prove, as relevant to Kiwana's appeal, that Kiwana has failed to meet the conditions established for the safe return of Jasmine to the home. *Id.* The circuit court found that Kiwana failed to satisfy three conditions of return: (1) that Kiwana “show that she is able to parent her children responsibly; specifically, that she is able to supervise her children appropriately, feed them appropriately, and intervene where there are safety threats”; (2) that Kiwana “maintain a relationship with [her] child by regularly participating in successful visitation”; and (3) that Kiwana “demonstrate that she is able and willing to care for [her] children and the[ir] special needs on a full-time basis.”

¶21 Kiwana contends that the circuit court's finding that she did not meet these three conditions was based solely on her failure to regularly attend visitations with Jasmine. While she admits that she did “struggle to establish [a] consistent visitation pattern with Jasmine,” she says the evidence demonstrated that her failure to do so was based upon her mental health issues and her move to Tennessee, which she states was based on her need to live closer to family and to obtain steady employment. She complains that the BMCW did nothing to help her overcome these challenges. The record belies her assertion.

¶22 On January 27, 2011, within forty-eight hours after the BMCW detained Jasmine pursuant to WIS. STAT. § 48.19, a temporary physical custody hearing was held before the circuit court. Kiwana was present at the hearing. Following the hearing, the circuit court found that there was probable cause to believe Kiwana was either neglecting, refusing, or unable to care for Jasmine. The BMCW then set up a visitation schedule permitting Kiwana to visit with Jasmine twice a week. Kiwana attended her scheduled visits for three months until she stopped attending in May 2011, claiming that she was physically and mentally unable to attend.

¶23 On February 1, 2011, the State filed a petition, asking the circuit court to find Jasmine to be a child in need of protection or services. A factfinding hearing on the CHIPS petition was scheduled and Kiwana was notified of the hearing date. However, on the date of the hearing, July 26, 2011, she failed to appear and had not contacted her attorney in over a month. Consequently, she was found in default.

¶24 At the time of the August 15, 2011 dispositional hearing on the CHIPS petition, Kiwana had been admitted into a mental health facility to seek treatment for her ongoing mental health problems. Following the hearing, the circuit court found Jasmine to be a child in need of protection and services, and entered a CHIPS order setting forth the conditions Kiwana needed to meet before Jasmine could be returned to her care. When entering the dispositional order, WIS. STAT. § 48.355(1) required the circuit court to “employ those means necessary to maintain and protect the well-being of the child ... which are the least restrictive of the rights of the parent and child.” In that light, the circuit court set forth the following conditions of return for Kiwana:

- Follow the directions and recommendations of her individual therapist and psychiatrist to learn to control her mental health concerns;
- Demonstrate that she is able to parent Jasmine responsibly, that is, show that she is able to supervise Jasmine, feed Jasmine, and intervene when there are threats to Jasmine's safety;
- Cooperate with case workers and providers;
- Maintain a relationship with Jasmine by regularly participating in successful visitation; and
- Demonstrate an ability and willingness to provide a safe level of care for Jasmine.

¶25 Despite the August 2011 CHIPS order requiring Kiwana to, among other things, maintain a relationship with Jasmine by regularly participating in visitation, Kiwana chose to move to Tennessee in December 2011. She continued to abstain from attending visitation or from otherwise contacting Jasmine. When Kiwana finally resumed visitation in January 2012, she was inconsistent with her visits, failing to see Jasmine at all for six of the twelve months in 2012. Kiwana continued sporadically visiting with Jasmine in 2013, visiting Jasmine twice in January, twice in February, not at all in March, once in April, and four times in May. However, in June 2013, Kiwana told her case manager that she wanted to voluntarily suspend visitation for six months. During the time that Kiwana voluntarily suspended visitation, case workers encouraged Kiwana to have other

forms of contact with Jasmine, including writing letters and calling her. However, Kiwana did not call, send letters, or otherwise attempt to contact Jasmine in any manner during that time.

¶26 Consequently, the State filed a petition to terminate Kiwana's parental rights to Jasmine in July 2013. At the same time, the State filed a motion to formally suspend visitation. In November 2013, Kiwana, through counsel, filed a motion requesting that visitation be reinstated, and the circuit court held a hearing on November 14, 2013, addressing whether visitation was appropriate.

¶27 At the hearing, Jasmine's therapist, Elizabeth Lanter, testified that Jasmine struggles with self-regulation and anxiety, exhibited by behaviors such as "banging her head and rocking at bed time and her inability to fall asleep and she twirls her hair a lot." Lanter told the court that when Kiwana was visiting with Jasmine, Jasmine's behavior would regress, stating that "[i]t was more difficult for her to fall asleep at night. Those nights she was in a more irritable mood, she was more withdrawn around the time after visits." Lanter also testified that Jasmine's behavior had improved since May 2013 when Kiwana stopped visiting Jasmine, and that Jasmine had told her foster mother that she did not want to see "momma Kiwana." Lanter worried that restarting visitation with Kiwana would cause Jasmine's behavior to regress.

¶28 Following the hearing, the circuit court acknowledged Jasmine's anxiety issues and noted it needed "to do what's in Jasmine's best interests." As such, the court stated that it was "not in any way inclined to just drop [Kiwana] back in Jasmine's life," but that it did "think that moving in the direction of returning visits is a good thing." Noting that Jasmine could still be returned to Kiwana's care, the court stated that it intended "to create a transition that will

begin to re-introduce, first, the idea of [Kiwana], then some communication with [Kiwana], then [Kiwana].” The court asked Lanter to introduce the idea of Kiwana to Jasmine in her next therapy session to see how she reacts. If Jasmine’s reaction was positive, the court asked Lanter to further explore the idea of Kiwana with Jasmine, with the hope of the process eventually evolving to the introduction of letters, phone calls, and visits from Kiwana. The circuit court refused to place a “time frame[]” on how quickly visits could potentially be reinstated. However, the court also cautioned that it was hopeful that some form of contact could be made by mid-January, and that if Kiwana believed the parties were “dragging their feet” she should file a motion to reopen the issue. The court also told Kiwana:

Now, [Kiwana], this requires of you two things. One is patience, the other is consistence. It is going to be necessary that as this develops that when it comes to writing letters, that you write a letter. Maybe you write a couple of letters. When it comes to making a phone call, that you make that phone call. That you be -- not just be willing to do it but that you do it. That when it comes time to have the first contacts, that you be present and patient in how that goes. And that as things continue to progress, that you be consistent in your contacts.

¶29 Kiwana wrote one letter to Jasmine and gave it to her caseworker in mid-January, two months after the visitation hearing. In May 2014, when the circuit court held the factfinding hearing on the TPR petition, Jasmine’s therapist still had not introduced the letter to Jasmine due to her extreme anxiety. Kiwana had not filed a motion with the court asking it to reconsider the visitation issue.

¶30 At the factfinding hearing on the TPR petition, Jennifer C., Jasmine’s foster mother, testified that Jasmine did not react well to the steps taken by herself and Jasmine’s therapist to reintroduce Kiwana. For example, she told the court that she had taken a picture of Kiwana on her phone and showed the picture to Jasmine. Jennifer C. testified that she took the picture of Kiwana at

Kiwana's last visit with Jasmine in May, thinking that she could "show [Jasmine] a picture of [Kiwana] and we could talk about that at some point." However, she testified that Jasmine reacted as follows:

Her initial reaction, I said -- I showed her the picture, and she just sort of turned the page. And I said, wait a minute, who is that? And she said, I don't know. And I said, well, it's Mama Kiwana. And she got this look on her face that I'm going to call terrified and said, I don't like her. I no see her. She coming? And she turned her head all the way around like this to try to see if she was around.

....

I was advised by the therapist not to mention the name because every time we mention the name she gets terrified. And then that particular night when I showed her the picture, she didn't sleep well at all.

¶31 Jennifer C. testified that despite Jasmine's reaction to Kiwana's picture, they were continuing to make steps towards introducing Kiwana's letter. They did this by having friends and family members, with whom Jasmine had a positive relationship, send letters to Jasmine.

¶32 In sum, we conclude that Kiwana's substantive due process rights were not violated. The conditions of return in this case—specifically, the conditions requiring her to show that she is able to supervise and care for Jasmine, to maintain a relationship with Jasmine, and to demonstrate an ability and willingness to care for Jasmine full time—were narrowly tailored to protect Jasmine while taking into account Kiwana's mental health needs and financial hardships. *See* WIS. STAT. § 48.355(1) (requiring the court to "employ those means necessary to maintain and protect the well-being of the child ... which are the least restrictive of the rights of the parent and child" when setting forth the conditions for return). Kiwana's own choices, particularly her choice to move to

Tennessee and her choice to refrain from consistently communicating with Jasmine, resulted in the circuit court's finding of unfitness.

¶33 The BMCW did everything it could in this case to help Kiwana maintain a relationship with Jasmine by setting up a visitation schedule and encouraging her to otherwise continue to communicate with Jasmine through letters and phone calls. The circuit court noted that Kiwana's decision to move to Tennessee made it much more difficult for the BMWC to provide services to help her.

¶34 Certainly, Jasmine's anxiety issues made reintroduction of Kiwana in the fall of 2013 difficult. However, it was Kiwana's behavior prior to the fall of 2013, including her failure to consistently visit with Jasmine, her failure to engage in other types of communication with Jasmine, and her decision to voluntarily abstain from visitation for six months beginning in May 2013, that led to Jasmine's unfamiliarity with Kiwana, and ultimately, Jasmine's anxious behavior in reaction to her.

¶35 Kiwana is correct that due process requires that the court-ordered conditions of return be narrowly tailored to meet the particular needs of a parent and a child. *See Jodi W.*, 293 Wis. 2d 530, ¶51. However, the conditions of return were narrowly tailored in this case. Kiwana admits that she failed to attend visitation for months at a time, citing her mental health issues and her need to seek treatment, financial hardships, and her move to Tennessee. While these hardships may have made it difficult for Kiwana to consistently visit Jasmine, Kiwana did not meaningfully take advantage of other forms of communicating with Jasmine, including contacting Jasmine by letter or by phone. Kiwana's choice to abandon all contact with Jasmine for months at a time negatively impacted her relationship

with Jasmine, such that she did not maintain a relationship with Jasmine and did not demonstrate that she was capable of caring for Jasmine on a full-time basis, as required by the conditions of return. As such, the circuit court did not err in finding Kiwana to be unfit pursuant to WIS. STAT. § 48.415(2). We affirm.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

